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CHILDREN'S LAW REPORT

Four Preconditions Model of Sexual Abuse: A Tool for Lawyers

For child abuse prosecutors, and attorneys presenting cases in family court, it is not only vital to know case law and rules of evidence, but it is also essential to understand the dynamics of child sexual abuse. This understanding will help the attorney analyze evidence, understand the emotions witnesses may experience, and ultimately be able to persuade a judge or jury that something so unthinkable could really happen.

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Nearly everyone will agree that child sexual abuse is a horrible thing and "molesters" should be "locked away". Yet something happens when a jury sees a defendant that doesn't look like a deranged sicko, but instead looks very much like their neighbor, minister, teacher, scout leader, or themselves. Juries do not want to believe that this happens everyday in "good" families, with trusted relatives, in beautiful day care centers, and in

churches. It is up to the prosecutor to show that sexual abuse can happen, does happen, and help juries understand how and why it happens.

David Finkelhor, Ph.D., has formulated a model that can be helpful in developing a theory for a case and organizing arguments. Through the "Four Preconditions Model of Sexual Abuse"¹, Dr. Finkelhor distinguishes elements of sexual abuse, making it easier to understand how it could have occurred.

An example of the importance of explaining the how and why comes with a murder case. The State may not technically have to prove motive, but everyone knows it is hard to persuade a jury without one. Understanding the "Four Preconditions", like understanding the possible motive of a murder, can help prosecutors answer the questions jurors silently ask themselves and debate in deliberations. *How can someone want to abuse a child? How is this person different from me? How could this happen? Wouldn't the mother have known? Why didn't the child just tell someone?* Only when jurors answer these nagging

¹ David Finkelhor. (1984) *Child Sexual Abuse: New Theory and Research*. New York, NY: The Free Press.

questions are they prepared to accept the reality of sexual abuse.

Finkelhor's model is a general model which can be applied to many forms of sexual abuse, including intra-familial as well as stranger assaults. It can encompass other theories pertaining to specific aspects of abuse.

According to this model, four things must happen in order for a child to be sexually abused. All factors contributing to sexual abuse can be grouped as contributing to one of the four preconditions. The attorney may be able to take seemingly small or unrelated events or actions and demonstrate how they fit together to allow sexual abuse to occur. The preconditions are: (1) A potential offender has some motivation to sexually abuse a child. (2) The potential offender overcomes internal inhibitions. (3) A potential offender overcomes external impediments, i.e. has the opportunity. (4) The child's possible ability to resist abuse is overcome. Each of these preconditions are manifested in some way if sexual abuse occurs. The first two preconditions address the perpetrator's behavior. The last two deal with outside factors which allow the abuse to occur to a particular child. The four preconditions are discussed below.

Motivation

The first precondition is that a person becomes interested in sexual contact with a child. While all sexual offenders are motivated somehow, it is imperative to note that the bases of their motivation differ. Some child sexual abuse may be part of an overall pattern of sexual deviance. In other cases, sexual activity with children is primarily an expression of psychopathology or of non-sexual emotional needs. Child sex offenders are a diverse group and do not present a standard

"personality profile".²

Dr. Finkelhor discusses motivation in terms of three components. The source of an offender's motivation may be related to one or more of these components, which include emotional congruence, sexual arousal, or blockage. Not all of these components are factors in every case, but they are good places for lawyers to look for possible explanations of behavior.

Emotional congruence: sexual involvement with a child primarily satisfies an emotional need rather than sexual interest. For example, an adult with low self-esteem may satisfy an emotional need to feel powerful and controlling by abusing children. An adult who was abused as a child may re-enact the abuse as a way of undoing his own childhood trauma. (Most victims do not, however, become abusers.) An offender's emotional development may have been arrested as a result of a traumatic childhood, i.e. they have childish emotional needs and relate to children as equals.

Sexual arousal: the offender experiences physiological sexual responses in the presence of children. A person may become sexually interested in children as a result of a conditioning childhood sexual experience. Perhaps a person observed others having sexual contact with children and accepted this as the norm. Child pornography or erotic portrayal of children in advertising may stimulate sexual interest in children.

Blockage: other potential sources of sexual gratification are not available or satisfying. A child sex offender may have had traumatic sexual

²See e.g. William D. Murphy and Timothy A. Smith. Sex offenders against children: empirical and clinical issues. In *The APSAC Handbook on Child Maltreatment* (John Briere et.al. eds., Sage Publications, 1996) at 175,177.

experiences with adults (such as impotence or abandonment by a lover) or may not have the social skills necessary to establish an adult sexual relationship. Some offenders may be experiencing marital problems. Sexual abuse of children is a complex behavior. Although it is often impossible to fully understand an adult's motivation to sexually abuse, exploring the above factors, and their interaction, may provide some insight into the offender's misguided interest in children as sexual objects.

Overcoming Internal Inhibitors

The second precondition is that a potential offender must overcome the internal inhibitions that would ordinarily keep one from acting on sexual desires toward children. Many adults may have a sexual interest in children, but know that it is wrong and don't act on their inclination. In cases where sexual abuse does occur, the adult is able to squelch the feeling that the act is unacceptable. The use of alcohol or drugs may be used to overcome inhibitions. Factors causing personal stress, such as unemployment or another crisis, may act to lower inhibitions. The offender may have an impulse control disorder or mental illness. In intra-familial cases, the higher prevalence of abuse of stepdaughters compared to biological children may reflect the offender's reduced inhibitions; the "incest taboo" is not as strong. The absence of strong, consistent criminal sanctions may play a role in offenders' failure to control their impulses.

Overcoming External Inhibitors

The third precondition relates to environmental factors which would ordinarily be expected to preclude sexual abuse. If sexual abuse is to occur, a potential offender must have the opportunity to be alone with a child, in the absence of supervising persons. For example, an offender may pursue opportunities to be with children,

through job or volunteer roles. A child who is inadequately supervised may be particularly vulnerable. A child who is isolated and has few friends may also be more easily accessible to an offender.

In cases of father-daughter incest, the inability of the mother to protect the child must be explained. Perhaps the mother is physically or emotionally ill, or is also abused by the father. The mother may be absent for long periods, e.g. working a night shift. Mothers can be a deterrent to sexual abuse not only by their physical presence, but also by being close to the child, recognizing when the child is troubled, and being someone the child can go to for help. Intra-familial sexual abuse is not as likely to occur where the mother would quickly suspect something is wrong and be determined to get to the bottom of it. While this is not blaming mothers, jury members will need to understand the mother's role.

Overcoming the Child's Resistance

Force may be used to overcome the child's resistance. However, in the more common cases in which children are coerced or tricked, their inability to resist needs to be explained. Juries may have difficulty understanding why a child would let someone abuse them with no physical struggle, and why the child often does not report it immediately.

Some children are more vulnerable than others. Some child molesters have been quoted as saying they can target potential victims in public places, such as playgrounds. They can sense which children would not play along, would not keep a secret, could not be intimidated. Children who portray such a demeanor may avoid abuse. A child who is emotionally insecure or needy may be at higher risk. Such children will find the attention, affection and bribes offered by an offender harder to resist. Children who do not have good

relationships with parents or other supportive adults may perceive that they have no one to tell. Many children are easy to abuse because they lack information; while taught about dangerous strangers, they are unprepared for the possibility of sexual abuse by someone they know and trust. Children may be afraid to tell as a result of threats by the offender, which are perceived as real by the child. Evidence of threats or positive rewards, or indications of a child's particular vulnerability, may be helpful in explaining to the judge or jury why a child did not resist or tell.

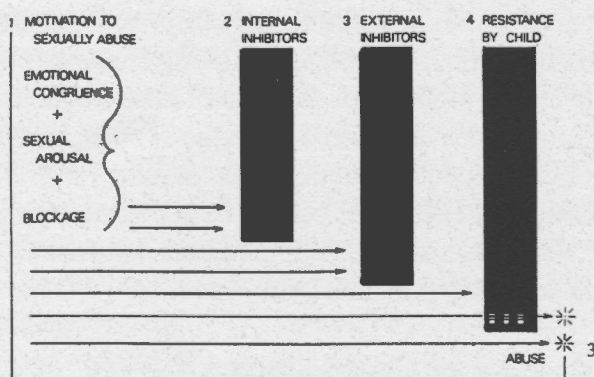


Figure 5-1 Four Preconditions of Sex Abuse

Conclusion

This theoretical model obviously is not intended to be used as evidence. Lawyers may find it helpful, though, in developing a logical framework that can be used to understand sexual abuse and explain some of the victim's and perpetrator's behavior. Through application of the model to particular cases, lawyers can identify the elements of child sexual assault, making it believable and understandable to judges and juries. To account for abuse, all four factors must be addressed:

- how an offender may have developed the desire to abuse a child;

- how he overcame the inhibitions most people feel about sexual activity with children;
- how the opportunity occurred; and
- why the child could not stop it.

Recent South Carolina Cases

Criminal Acts and Adoption

The South Carolina Supreme Court reviewed the case of *Doe v. Brown*, Opinion Number 24680, September 2, 1997. The Supreme Court considered the question of whether the father of a child conceived because of statutory rape has any parental rights to the child. The family court ruled that the father did not have any parental rights. Additionally, the family court held that the father did not comply with the requirements of §20-7-1690(a)(5). This provision provides that the father is entitled to consent to an adoption if the father openly lived with the child or mother or the father paid child support or other basic expenses related to the birth.

The infant was conceived as the result of the statutory rape of a 12-year-old female. The mother relinquished her parental rights and consented to the adoption. The Supreme Court reviewed and interpreted several statutes concerning adoption. §20-7-1695 outlines the category of parents from whom consent for purposes of adoption is not required. The court held that this statute does not exempt parents of a child conceived by a criminal act. However, §20-7-1734 provides the list of individuals and agencies who are required to have notice of any adoption proceedings. This statute provides that a father is **not entitled to notice** of the adoption when the child has been conceived because of criminal sexual conduct or incest.

³ Finkelhor, *supra* at 55.

The South Carolina Supreme Court held that "criminal parents" must be treated as other out of wedlock parents for purposes of consent and relinquishment requirements under §20-7-1695. The court held that public policy is served by recognizing a legal relationship between the "criminal parent" and the child.

The court, however, upheld the adoption in this case because the father did not comply with the requirements of §20-7-1695(A)(5)(b), [See also, *Abernathy v. Baby Boy*, 313 S.C. 27, 437 S. E. 2d 24 (1995)].

Evidence of Force Required for Criminal Sexual Conduct Conviction

The South Carolina Court of Appeals reviewed the case of *State v. Green*, Opinion No. 2700, filed July 21, 1997, Advance Sheet No. 22. John Green was convicted of two counts of first-degree criminal sexual conduct (CSC) and one count of committing a lewd act upon a child. These charges were based on a series of incidents involving an eleven-year-old child. He appealed the CSC conviction, challenging the court's denial of his motion for a directed verdict.

According to testimony presented at trial, Green shaved the child's pubic hairs, rubbed baby oil all over her body, including her breasts and vaginal area, performed oral sex, and attempted penile penetration. The child testified that Green's hands were on her shoulders during the incidents. A physician also testified that there was an interruption in the child's hymen caused by blunt force penetrating trauma.

Green asked for a directed verdict on the CSC charges, asserting that the state presented no evidence of the use of aggravated force. Green was indicted under S.C. Code Ann. § 16-3-652 (1985).

This section defines first degree CSC as a sexual battery accomplished through the use of aggravated force. Aggravated force is defined as the use of "physical force or physical violence of a high and aggravated nature to overcome the victim. . ." S.C. Code Ann. § 16-3-651(c)(1985).

The state argued that if circumstances of aggravation existed (as under the law of Assault and Battery of a High and Aggravated Nature), then the aggravated force requirement would be met. The appellate court disagreed, noting the definition of aggravated force contained in the CSC statute. This statute does not rely on the elements of assault and battery of a high and aggravated nature.

The state also argued that force could be inferred from the victim's testimony that the oral sex hurt and from the physician's testimony that the tear in the child's hymen would have been painful. The appellate court disagreed concluding that, although the testimony is relevant to the occurrence of a sexual battery, it does not show that the battery was accomplished through force. The Court of Appeals, finding no evidence of force, determined that the trial court should have granted the motion for a directed verdict and reversed the case, remanding for entry of judgment of acquittal on the first degree CSC counts.

The Court of Appeals observed that the evidence apparently would have supported a first-degree CSC charge under S.C. Code Ann. §16-3-655(1)(1985). This section defines CSC with a minor in the first degree as a sexual battery with a victim who is less than eleven years old. Force is not necessary for a conviction under this section. However, the defendant in this case was not indicted under §16-3-655(1).

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Specialist with the S.C. Prosecution Coordination

Commission, advises prosecutors to indict under the section for CSC with a minor when the victim is under sixteen. In cases brought under this section, only the occurrence of a sexual battery and the child's age are factors. CSC with a minor in the first degree applies if a victim is under eleven [§16-3-655(1)], and CSC with a minor in the second degree should be charged if the victim is between eleven and fourteen [§16-3-655(2)]. Second degree also applies if the victim is fourteen or fifteen and the actor is in a position of authority or is older than the victim. [§16-3-655(3)]. The statute recognizes that force, as traditionally defined, is usually not necessary to accomplish a sexual assault of a child. Children often acquiesce to adult offenders or are easily coerced.

According to Ms. Mayes, there is no advantage to a conviction under CSC versus CSC with a minor. CSC with a minor offenses are considered violent crimes [§16-1-60]. Persons convicted under CSC with a minor in the first degree and (except in limited circumstances) CSC with a minor in the second degree are required to register under the sex offender registry. [§23-3-430]. The maximum penalties for comparable degrees are not different. The only possible advantage in pursuing a CSC charge would be cases in which the victim is between eleven and fourteen years old. These would be second degree CSC with a minor, which carries up to twenty years. A first degree CSC conviction could carry thirty years but requires proof of force. This trade-off should be carefully evaluated.

EPSDT: Medicaid's Preventive Services for Children

Early Periodic Screening Diagnosis and Treatment (EPSDT) is a component of the Medicaid program funded with a combination of state and federal funds. The primary goal of

EPSDT is to provide an adequate preventive, well-child program for Medicaid children under 21 years of age. The thought is that early diagnosis and treatment of problems in children will prevent the problems from growing more complicated and more expensive in the future.

All children who are Medicaid eligible are automatically eligible for EPSDT. Additionally some states have elected to expand the group of children eligible for EPSDT and include children of the working poor in addition to children who receive Medicaid. Although South Carolina does not provide any special category of eligibility solely for EPSDT, the state has recently expanded Medicaid eligibility for children. The "Partners For Healthy Children" initiative has raised the eligibility income limit to 150% of the federal poverty level for children up to age 19. (To learn more about the Partners For Healthy Children program call 1-888-549-0820.) Most foster children in South Carolina qualify for Medicaid.

The first part of EPSDT, "early periodic screening and diagnosis" refers to the fact that states are supposed to set up a regular schedule, developed by the state in consultation with appropriate health care providers, for children to receive a complete medical screening. Separate schedules may be established for medical, dental, vision and hearing services, or may be incorporated into the schedule for medical screenings. The medical screen generally includes a comprehensive unclothed physical exam, a physical and mental developmental assessment, appropriate immunizations, laboratory tests including a blood lead level test, and health education. The screen is supposed to address not only the children's physical health, but their social and emotional development as well. The frequency of regular screens will depend on the child's age, but the law allows for "interperiodic screens" as well. A child may receive an interperiodic screen between the

regular intervals when necessary to determine whether the child has a suspected illness or condition. The federal and state governments are trying to ensure that if the child develops any problems the problem is diagnosed and treated as early as possible.

The second part of EPSDT, treatment, is one of the most encouraging parts of the EPSDT aspect of the Medicaid program. Children can be eligible for services not normally included in a state's Medicaid program, if those services are determined to be medically necessary. Medicaid operates as a federal-state partnership consisting of two different parts. The first part consists of mandatory medical services that every state which participates in Medicaid must offer. The second part is a group of optional medical services from which the states can pick and choose. Each state that participates in Medicaid and accepts federal money for the program designs its own Medicaid program through a combination of all the medical services which are mandatory and the optional services that the state has elected to include. The state must also make medically necessary transportation available.

Under EPSDT, children are eligible for diagnostic and treatment services necessary to correct or ameliorate illness or conditions discovered in an EPSDT screen, provided the services are of a type allowed by federal law to be covered under Medicaid. Therefore children are entitled to medically necessary optional as well as mandatory Medicaid services. State utilization controls may not deny children medically necessary services even if the optional programs are not normally covered under the State Medical Plan. Requirements for dental, vision, and hearing services are specifically spelled out. Children who have been victims of domestic violence or subjected to physical or emotional abuse may receive counseling and therapy through Medicaid.

Any medical service which is mandatory or optional under the federal Medicaid program may be provided to children under the EPSDT provisions. This can include services such as in-home nursing counseling services as often as once a day, braces, partial bridges, etc.

In South Carolina the Medicaid program is administered by the South Carolina Department of Health and Human Services. Applications for Medicaid can be obtained at the Department of Social Services, which also provides EPSDT information as part of the Medicaid application process.

If a child is denied medical services required by federal law a challenge can be brought on behalf of the child through an administrative hearing, known as a fair hearing. The parent can bring the challenge. If a foster child is denied medically necessary services for which they are eligible, you may want to make a referral to your local legal services to see if they would represent the child in a fair hearing. If necessary a challenge can be made to change state policy.

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